89-462

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALDO L. LIVERA, JR., SUSAN LIVERA, THE LIVERA COMPANY, ALPHA HERMETIC, INC., C.M.R. INDUSTRIES INC., CHARLES DONALD MCALLISTER, JR., and ALICE ANN MCALLISTER,

Petitioners,

v.

UNITED STATES SMALL BUSINESS ADMINISTRATION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER a United States court of appeals has jurisdiction to review a final judgment of a United States district court after a separate "break away" action has produced a final and non-appealable judgment between the same parties on the same issues.

2. If there is such jurisdiction, WHETHER a court of appeals on its review may render a judgment inconsistent with the holding in the earlier *res judicata*.

3. WHETHER a final and non-appealable judgment of a district court binds a court of appeals when the parties to the judgment appear before the court of appeals on the same issues.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

There are no parent companies, subsidiaries, or affiliates of the corporate petitioners.

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IN THE

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No.

ALDO L. LIVERA, JR., SUSAN LIVERA, THE LIVERA COMPANY, ALPHA HERMETIC, INC., C.M.R. INDUSTRIES INC., CHARLES DONALD MCALLISTER, JR., and ALICE ANNE MCALLISTER,

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UNITED STATES SMALL BUSINESS ADMINISTRATION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 18, 1989.

OPINION BELOW

The opinion of the Court of Appeals (*see* Appendix A) dated July 18, 1989, has not been reported. An order (*see* Appendix B) denying petition for rehearing and rehearing in banc filed by the Court of Appeals on August 17, 1989, has not been reported.

JURISDICTION

Petitioners commenced this action in the Eastern District of New York in 1981 seeking protection from the collection efforts by a bank on a loan guaranteed by the Small Business Administration (hereinafter "SBA") and invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1361. The action was transferred to the District of New Jersey in 1982 pursuant to 28 U.S.C. § 1404. In 1983, the United States and SBA obtained leave to assert a late counterclaim on a portion of the loan, claiming assignment from the bank; the counterclaim, however, was never filed in the action. In 1983, the United States and SBA obtained an order of the district court dismissing them from the action on the grounds that petitioners' claims sounded in tort and petitioners had not complied with the administrative claim requirement of the Federal Tort Claims Act; in a 1984 clarification of the order (*see* Appendices C and D), the district court refused to permit the United States and SBA to file at that point the unasserted counterclaim in the action. The United States and SBA then appealed the clarified order to the Third Circuit which in 1984 dismissed the appeal as interlocutory, the United States and SBA not having secured a Fed.R.Civ.P. 54(b) statement in the order. The order then was permitted by the government to remain interlocutory until the conclusion of the action in 1988.

In 1985 the United States commenced an action against petitioners in the District of New Jersey to collect the assigned portion of the loan, invoking jurisdiction under 28 U.S.C. § 1345 (United States as plaintiff). In 1986 the district court granted summary judgment dismissing the complaint with prejudice and entered final judgment (*see* Appendices F-I). The government then appealed of right to the Third Circuit, but then moved to dismiss the appeal without stating grounds. The Third Circuit granted the motion in 1986.

In 1988, the district court in the 1981-commenced action below, being advised that all parties not dismissed from the action had settled, entered final judgment of dismissal (*see* Appendix E).

The United States and SBA then appealed to the Third Circuit, invoking jurisdiction under 28 U.S.C. § 1291, to bring up for review the 1984 order (*see* Appendices C and D) which had refused permission to file the unasserted counterclaim to collect the assigned portion of the loan.

Petitioners then moved the Third Circuit to dismiss the appeal on grounds, *inter alia*, that the Third Circuit lacked jurisdiction or would not properly reach the merits given the *res judicata* effect of the final judgment entered in the 1985-commenced action.

The Third Circuit on July 19, 1989, denied the motion and reached the merits of the appeal by the United States and a protective cross-appeal taken by petitioners (*see* Appendix A). On August 17, 1989, the Third Circuit denied petitioners' motion for rehearing and rehearing in banc (*see* Appendix B). On August 29, 1989, the Third Circuit, being advised of petitioners' intention to seek a writ of certiorari from this Court, stayed issuance of its certified judgment in lieu of formal mandate until September 23, 1989.

The jurisdiction of this Court to review the judgment and opinion of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

STATEMENT OF THE CASE

How many final judgments are required to bind the United States as a party litigant to a particular controversy?

On June 27, 1985, the United States commenced an action (not the action from which this petition evolves) in the United States District Court for the District of New Jersey against the petitioners to this Court (who will be referred to hereinafter as the "Livera parties"). The complaint alleged that the Livera parties had borrowed money from a bank, that the SBA had guaranteed the loan, that the Livera parties had failed to make repayment as due, that the SBA had reimbursed the bank a portion of the unpaid balance, and that the SBA was entitled to recover the amount of the reimbursement from the Livera parties.

No mention was made in the complaint of another action in the same court (the action from which this petition evolves) which had been commenced by the Livera parties in 1981 to obtain injunctive relief and damages for breach of promises made in the loan instruments, and for violation of SBA regulations by the bank and the SBA.[1] In that other action, which included as defendants the bank, the United States, and the SBA, the United States and SBA had been granted permission to assert a late counterclaim in the action to recover the unpaid portion of the loan, then had decided not to file and serve the counterclaim or had neglected to do so, then had been denied permission to assert the counterclaim in an opinion and order (*see* Appendices C and D) which also dismissed the complaint as against the United States and SBA. The government then had taken an appeal to the

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[1] The action was commenced in the Eastern District of New York by the filing of a complaint which invoked jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1361; the action was transferred to the District of New Jersey pursuant to 28 U.S.C. § 1404.

Third Circuit which the government then had permitted to be dismissed apparently because the order was interlocutory in form (no Fed.R.Civ.P.54(b) statement had been obtained from the district court) and the government thereafter had allowed the order to remain interlocutory.

Apparently anticipating problems with the "break away" litigation it then was commencing, the United States made the curious allegation in its 1985 complaint against the Livera parties that "No other action has been brought for the recovery of the SBA portion of the Loan aforesaid."

In October 1985 the Livera parties moved for summary judgment dismissing the complaint of the United States. The grounds of the motion were (i) that the subject of the 1985 complaint comprised a compulsory counterclaim in the 1981 action commenced by the Livera parties and that such a counterclaim had not properly been asserted and (ii) that an order entered in the 1981-commenced action denying the United States leave to assert a late counterclaim amounted to a Fed.R.Civ.P.41(b) dismissal on the merits for failure to prosecute which barred the 1985 complaint.

The district court granted the motion on both grounds and directed the Clerk to enter a final judgment dismissing the complaint on the merits (*see* Appendices F and G). The United States then moved for reargument which was denied (*see* Appendices H and I). While the government strenuously argued that its complaint was not dismissable as a substantive matter, at no time (whether in opposition to the motion to dismiss, in support of reargument, or in settlement of the orders entered by the district court) did the government assert that entry of final judgment on the merits was an improper or unwanted procedural disposition of its "break away" action. Stated another way, the United States never urged the district court to permit it to discontinue the action without prej-

udice, or to permit entry of an order which was interlocutory in character rather than final, or to permit adoption of any other measure which would result in a disposition of the action by a judgment which was other than final and appealable of right.[2]

On January 13, 1986, the Clerk of the United States District Court for the District of New Jersey entered final judgment (*see* Appendices G and I) in the action commenced by the United States against the Livera parties. That judgment dismissed on the merits all claims of the United States to recover money lent to the Livera parties. The judgment recited that the dismissal was "with prejudice and without costs." The Livera parties believed at the time, and adhered to that belief in the conduct of the remaining litigation, that all rights of the United States against the Livera parties merged into that final judgment, subject only to the undoubted right of the United States to seek redress from the judgment by timely exercise of its rights of appeal.

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[2] One objective of the United States in filing its 1985 "break away" complaint may have been to obtain access to the Court of Appeals since the order in the 1981-commenced action, which denied it leave to assert its claim against the Livera parties via counterclaim in the 1981 action, remained interlocutory. If so, its commencement of the 1985 "break away" action is all the more curious. The United States did not request a Fed.R.Civ.P. 54(b) statement in the order entered in the 1981-commenced action so that it could take an appeal of right. Nonetheless, the United States then delayed past the point when an appeal of right could have been noticed of right, and then moved the district court for permission to take a late appeal. The district court, obviously intending to permit an appeal to be taken, granted the motion, but still the United States did not obtain the jurisdictional Fed.R.Civ.P. 54(b) statement. Nonetheless, it then noticed an appeal and, when the Court of Appeals questioned its jurisdiction *sua sponte*, moved to dismiss its own appeal rather than resettle the order in the district court to obtain a jurisdictional statement. Seven months later, the government commenced its "break away" action.

The United States set out to exercise just those appeal rights on May 29, 1986, by noticing an appeal of right from that final judgment to the Third Circuit Court of Appeals. To the puzzlement of all concerned, the United States then turned about and, in what surely was a conscious and calculated decision on its part, secured dismisal of its own appeal by motion and without consent of the appellees. Thus, the precise claim of error of the United States never was articulated via appeal. It may be that the district court erroneously granted summary judgment dismissing the claims of the United States against the Livera parties. Whether the district court committed error, however, was not determined because the United States decided not to proceed. After that, presumably, the same issues would not be presentable to another court for a redetermination.

If the law of judgments applies to the United States as a party, the controversy with the Livera parties, at that point in 1986 became a *res judicata*, not properly to be litigated further.

In December 1987, as the 1981-commenced action was called to trial against the remaining parties defendant, the Livera parties, relying on the finality of the 1986 judgment dismissing the claims of the United States, settled with the bank, and declined to go to trial against the sole remaining defendant, an SBA employee who was by then dying of a brain tumor. On being advised of these developments, the district court entered a final judgment (*see* Appendix E) dismissing the 1981-commenced action on February 4, 1988.

On March 3, 1988, the United States and SBA noticed an appeal from the final judgment in the 1981-commenced action for the purpose of bringing up for review the district court's 1984 order (*see* Appendices C and D) which had denied the motion of the United States to assert a counterclaim against the Livera parties. Because of the 1986 judgment dismissing the complaint of the United

States against the Livera parties, and because of the passage of years and the reliance on the *res judicata* in settling with the bank and in declining to proceed to trial against the SBA employee, the Livera parties then endeavored to assert the 1986 judgment in the court of appeals.

On April 14, 1988, the Livera parties moved in the court of appeals to dismiss the appeal noticed by the United States and SBA upon the grounds that the final judgment in the 1985-commenced "break away" action finally determined, barred, and was *res judicata* of the 1984 order which the appeal sought to bring up for review; and because the court of appeals lacked jurisdiction to hear and determine an appeal under such circumstances.

The court of appeals determined not to hear the motion, however, until the appeal, and a protective cross-appeal which petitioners had noticed, were fully briefed. The appeals were fully submitted and argued on January 10, 1989. The decision of the Third Circuit (Appendix A) was filed on July 18, 1989, and its order denying rehearing and rehearing in banc (Appendix B) was filed on August 17, 1989.

The Third Circuit's opinion and judgment holds that a court of appeals has jurisdiction to review an interlocutory order of a district court whenever 28 U.S.C. § 1291 is invoked by entry of final judgment despite the fact that a *res judicata*, in the form of a final judgment in another action, has intervened before the interlocutory order became appealable via 28 U.S.C. § 1291. The Third Circuit's opinion and judgment also holds that the final judgment in the "break away" action does not bar the Court of Appeals from reconsidering whether the district court abused its discretion in the 1984 order below by refusing to permit the United States to assert its claim against the Livera parties via a counterclaim in the action below, and does not bar the Court of Appeals

from remanding to the district court for reconsideration as to whether its 1984 order was an appropriate sanction on the government for its tardy handling of its case.

The rationale of these holdings is that the final judgment in the 1985-commenced action was predicated on the 1984 interlocutory order in the 1981-commenced action which was now before the Court of Appeals for review, and that Fed. R. Civ. P. 60(b)(5) permits relief from a final judgment if a prior judgment on which it is based should be reversed.

The vice of these holdings is that they permit the reopening of matters settled in final and unappealable judgments. Moreover, it now appears to be possible, if these holdings are not corrected, that the district court might on remand determine that its 1984 order was inappropriate, proceed to trial on a counterclaim, and enter a judgment in favor of the United States. There would then exist in the district court a 1986 judgment dismissing the United States' claim against the Livera parties on the merits and a later judgment granting those same claims.[3]

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT ISSUES OF SOCIAL POLICY AND FEDERAL JURISDICTION IN THE CONTEXT OF AN ERRONEOUS DECISION OF A COURT OF APPEALS

Parties desperately need to have an end to litigation, and counsel need to know when litigation has come to an end. The decision of the Third Circuit in this case stands

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[3] It also is possible, to be sure, that the district court on remand might enforce the 1986 judgment by enjoining further proceedings below (thus prompting further appeals); or it might adhere to its 1984 order in the action below (thus prompting further appeals); but surely the reach of *res judicata* is long enough to cut short all of these proceedings.

the common law of judgments and the doctrine of *res judicata* on end, and introduces unwarranted uncertainty as to when and how any particular claim is judicially concluded. If that decision is correct, parties who split or break away their claims from one action, who then suffer an adverse result in the "break away" action, and who then make a conscious decision not to perfect an appeal of right, are rewarded with the possibility of obtaining another chance down the road. On the other hand, parties who rely on the finality of the "break away" judgment, and who conduct the remaining litigation in a particular way, including by entering into settlements and by making decisions not to prosecute further, hazard themselves and are penalized for their justifiable reliance.

In the past, this Court has husbanded the doctrines of *res judicata* and finality of judgment, warding off even subtle attempts to erode their salutary effects upon a legal system designed to end disputes and grant just peace to litigants. The case of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) seems directly on point here, and the decision of the Third Circuit below is in conflict with *Federated*'s holdings and its reiteration of long standing principles. *Federated* also involved multiple party litigation in which one party had decided not to appeal from a judgment of dismissal on the merits and instead started a new action. The new action was dismissed on invocation of the previously entered judgment. Meanwhile, other parties had appealed successfully from the judgment of dismissal in the first action. The dismissal of the second action then came before the court of appeals which recognized that strict application of *res judicata* would "preclude [its] review" of the judgment. *Moitie v. Federated Department Stores, Inc.*, 611 F.2d 1267, 1269 (9th Cir. 1980). Nonetheless, the court of appeals went on to hold that the doctrine of *res judicata* "must, in rare instances, give way to overriding concerns of public policy and simple justice," *id.*, which it per-

ceived as present, then reviewed the case and reversed the district court's judgment of dismissal. This Court reversed in the *Federated* decision, *supra*, in which both concurring and dissenting opinions were in accord on the issues of judgment finality.

In summarizing the extensive law on the subject, the Opinion of the Court in *Federated* pointed out that a final judgment on the merits precludes litigation of issues that were or could have been raised; that the *res judicata* consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been incorrect; that a judgment voidable because based upon an erroneous view of the law is not open to collateral attack and can be corrected only by direct review; and, citing *Ackermann v. United States*, 340 U.S. 193, 198 (1950), that when a party subject to a judgment makes a calculated choice to forego an appeal of right, general principles of equity, such as those embodied in Federal Rule of Civil Procedure 60(b), will not overcome application of *res judicata* which "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Federated*, *supra* at 401-402. In concurring, Justice Blackmun emphasized that there is "special need for strict application of res judicata in complex multiple party actions . . . so as to discourage 'break away' litigation." *Id.* at 403. In dissenting, Justice Brennan, after observing that a party decides when and how to institute a particular action, *id.* at 406, emphasized that failure to enforce the issue preclusion effect of judgments on all theories that might have been presented "can only create doubts and confusion . . . and may encourage litigants to split their causes of action . . . in the hope that they might win a second day in court." *Id.* at 41.

The Third Circuit decision below, if it is permitted to stand, will erode the doctrine of *res judicata* as articulated in the *Federated* decision. Moreover, noting that

the Third Circuit was asked below by motion to declare its lack of jurisdiction to review an interlocutory order in one action given the intervening *res judicata* in the other action, and clearly refused to do so on authority of Federal Rule of Civil Procedure 60(b), the jurisdictional dimension of *res judicata* preclusion is presented in this case. In *Federated*, this Court seemingly approved the court of appeals' concession that *res judicata* strictly applied *precludes review*. *Id.* at 397. This Court has said that "jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent judgment." *Reed v. Allen*, 286 U.S. 191, 198 (1932) quoted in *Federated*, *supra* at 400. Contrarily, the Third Circuit specifically holds below that, "[w]hile it is true that res judicata can be applied to bar relitigation of claims previously decided on the merits, res judicata is an affirmative defense and not a doctrine which would defeat subject matter jurisdiction of this court." While 28 U.S.C. § 1291 grants jurisdiction to courts of appeals to review along with final judgments of district courts those interlocutory orders which have not previously been reviewed, one may ask whether that properly is the case in the instance of an interlocutory order which is precluded by an intervening final judgment in a "break away" action. Is *res judicata* just an affirmative defense of sometimes application?

This case thus presents important issues of social policy and federal jurisdiction in the context of an erroneous decision of a court of appeals.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 19, 1989

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-5187 and 88-5216

LIVERA, ALDO L., JR. and ALPHA HERMETIC, INC.

C.M.R. INDUSTRIES, INC., CHARLES DONALD MCALLISTER, JR., and ALICE ANN MCALLISTER, SUSAN LIVERA and LIVERA COMPANY

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY, PATRICK WALLACE, BEN BERZIN, JR., "A", "B", MICHAEL CARDENAS, in his capacity as Administrator of the Small Business Administration, RONALD LANGELL, "C", "D" and THE UNITED STATES OF AMERICA

FIRST NATIONAL STATE BANK OF NEW JERSEY,
Defendant & Third Party Plaintiff

vs.

SUSAN LIVERA and THE LIVERA COMPANY,
Third Party Defendants

U.S. SMALL BUSINESS ADMINISTRATION
and the UNITED STATES OF AMERICA,
Appellants in No. 88-5187

LIVERA, ALDO L., JR. and ALPHA HERMETIC, INC.

C.M.R. INDUSTRIES, INC., CHARLES DONALD MCALLISTER, JR., and ALICE ANN MCALLISTER, SUSAN LIVERA and LIVERA COMPANY,

Appellants in No. 88-5216

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY, PATRICK WALLACE, BEN BERZIN, JR., "A", "B", MICHAEL CARDENAS, in his capacity as Administrator of the Small Business Administration, RONALD LANGELL, "C", "D" and THE UNITED STATES OF AMERICA

FIRST NATIONAL STATE BANK OF NEW JERSEY,
Defendant & Third Party Plaintiff

vs.

SUSAN LIVERA and THE LIVERA COMPANY,
Third Party Defendants

Appeal from the United States District Court
for the District of New Jersey—Newark
(D.C. Civil No. 82-1730)

Argued January 10, 1989

Before: STAPLETON and MANSMANN,
Circuit Judges, and
HUYETT, *District Judge*.*

(Filed July 18, 1989)

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* Honorable Daniel H. Huyett 3rd of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Before us is the remaining balance of litigation commenced in 1981 in which individuals and corporations owned by them sought injunctive relief and money damages arising out of a lending institution's alleged mis-

handling in both the granting and administering of a Small Business Administration ("SBA") guaranteed loan.

The government has recently filed an appeal from an order entered May 15, 1984 which precluded it from asserting a counterclaim against the plaintiffs (the "Livera group") for its alleged default on the SBA-guaranteed loan. The government was finally able to appeal the order when the district court entered a final judgment in the litigation on February 4, 1988. The Livera group cross-appealed, claiming that the same May 15, 1984 order improvidently dismissed the action it had commenced against the SBA.

We conclude that the district court properly dismissed the Livera group's initial complaint because of its failure to file the requisite administrative claim before the SBA.

In refusing to allow the government to assert its counterclaim, however, the district court failed to consider the factors outlined by us in *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863 (3d Cir. 1984), which we have deemed to govern judicial determinations in dismissing actions. This represents an abuse of discretion necessitating a remand to the district court.

Finally, if, on remand, after analysis of the *Poulis* factors, the district court determines the dismissal was unwarranted and permits the government's counterclaim to stand, the Livera group shall be given the opportunity to respond to the counterclaim by asserting a defense of recoupment grounded on the allegations in its original complaint.

I.

As part of the Small Business Administration's guaranteed loan program designed to assist small businesses in obtaining credit, First National State Bank made a $150,000 loan to Alpha Hermetic, Inc. in 1980. Under the program, should all other guarantors default in their

obligations, ninety percent of the loan was guaranteed by the SBA. Here, the loan was personally guaranteed by certain of the individual and corporate plaintiffs to this lawsuit, Aldo Livera, Donald and Alice McAllister and C.M.R. Industries, *i.e.*, the Livera group. Similar guarantees were signed by Susan Livera and the Livera Company.

In 1981 suit was commenced by the Livera group, alleging that the SBA and certain of its employees, acting through First National State Bank,[1] deprived it of the regulatory protections and benefits of the Small Business Act and charged a variable and usurious rate of interest on a loan issued by the bank under the guaranteed loan program.

Six months after the action was filed, the SBA received permission from the district court to file an amended answer and to assert a counterclaim against the Livera group for the ninety percent portion of the loan which the SBA had reimbursed to the bank. Although the Livera group, Susan Livera and the Livera Company were aware of the contents of these pleadings and were presented with copies, the amended answer and counterclaim were not served or filed in accordance with procedural rules.

In March 1983 the government moved for dismissal of the Livera group's claims, contending that the district court lacked subject matter jurisdiction. The government argued that since the Livera group's claim arose under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)

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[1] The complaint also named First National State Bank as a defendant. The bank filed an answer and a counterclaim for the unpaid loan balances not entitled to SBA reimbursement. The bank later moved to amend its answer to include a third-party complaint against Susan Livera and the Livera Company. The history of the third-party complaint is discussed, *infra*. Typescript at 11-17. All claims between the Livera group, Susan Livera, the Livera Company and the bank have either been dismissed or settled.

(1948), the Livera group's failure to file the statutorily prescribed administrative claim before the appropriate agency under 28 U.S.C. § 2401(a) precluded the present action. In the same motion, the government also attempted to reassert its counterclaim for the balance due on the loan. The district court dismissed the complaint, agreeing that the Livera group's failure to file the prerequisite administrative claim was fatal to its cause of action before the district court. The Livera group requested reconsideration and also asked for clarification of the status of the SBA's counterclaim. The motion for reconsideration was denied. As to the counterclaim, the district court stated that the government "failed to serve and file an amended answer with proposed counterclaim" and that "its request to assert a counterclaim at this point in the proceedings, *nunc pro tunc*, is denied." App. at 124. The government filed a notice of appeal; however, upon threshold jurisdictional inquiry from us, it decided that the order was interlocutory and voluntarily withdrew the appeal without our final determination as to appealability.

In May 1985, the government, on behalf of the SBA, commenced a separate, plenary action in the district court against the Livera group, raising the same allegations concerning the unpaid balance of the loans as in its previous counterclaim in the 1981 action.[2] The Livera group

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[2] The government claims that in an April 1985 conference counsel for both sides stated that they were going to present their dismissed claims in a new action. The government contends that, upon discovering a statute of limitations problem which would preclude the Livera group from filing an administrative claim under the Federal Tort Claim Act, the parties agreed that the government would file the new action in which the plaintiffs could counterclaim since, under the Federal Tort Claims Act, an administrative claim is not a condition precedent to a cognizable counterclaim.

The district court did not mention this agreement in deciding to grant the plaintiffs' motion for summary judgment in the plenary

moved for dismissal based upon the district court's adverse ruling on the government's counterclaim in the 1981 action. The motion was granted by the district court and a final order, dismissing "with prejudice" all claims of the government against the plaintiffs, was entered on January 14, 1986. An order denying the government's motion for reconsideration was entered on March 27, 1986 from which the government noticed an appeal to this court. The government, however, did not prosecute the appeal, securing an order of dismissal on its own motion in July 1986.

On February 4, 1988, with respect to the original 1981 case, the district court entered a final order dismissing the 1981 action, it appearing that all claims not previously dismissed had been settled or compromised to the satisfaction of the parties.

The government now seeks review of the 1984 order entered in the 1981 action. Particularly, the government seeks to reinstate its counterclaim for the unpaid balance of the loan and to proceed to trial.

The Livera group filed a motion to dismiss this appeal premised on principles of res judicata. It alleges that the 1986 order dismissing the government's plenary action was an adjudication on the merits of the government's counterclaim in the present matter and, accordingly, deprives us of subject matter jurisdiction to hear this appeal.

The Livera group's characterization of the doctrine of res judicata is misplaced. While it is true that res judicata can be applied to bar relitigation of claims previously decided on the merits, res judicata is an affirmative defense and not a doctrine which would defeat subject matter jurisdiction of this court.

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action based upon the order precluding the SBA's assertion of a counterclaim in the 1981 action. We likewise make no comment on the government's factual presentation which is dehors the record.

In any event, although the district court in granting the Livera group's summary judgment motion in the plenary action referenced the "res judicata" effect of its May 15, 1984 order dismissing the SBA's counterclaim for failure to prosecute under Fed. R. Civ. P. 41(b), it obviously meant that it had already ruled on the issue and would not do so again in a different posture. The district court's use of this language has no preclusive effect on us. The May 15, 1984 order was interlocutory and did not become final until the district court entered its order on February 4, 1988 disposing of the 1981 action.

The government's withdrawal of its appeal in the plenary action, which could have been interpreted as a collateral attack on the May 15, 1984 order, likewise has no res judicata effect on our consideration of an issue which has now finally "matured" for appealability purposes. We will therefore deny the motion to dismiss for lack of subject matter jurisdiction and proceed to the merits of the appeal.

Our jurisdiction is premised on 28 U.S.C. 1291. When a district court enters its final order terminating a litigation, orders previously entered during the course of the action can be reviewed by us if so requested by an aggrieved party.

To the extent that the Livera group argues that the district court's judgment against the government in this case should be affirmed on the alternative ground that its claim is barred by the res judicata effect of the unappealed judgment in the plenary action, we are unpersuaded. The judgment in the plenary action is based upon the res judicata effect of the May 15, 1984 order, which is the judgment the government appeals in the present action. The Livera group, therefore, asks this court to bar appeal of the May 15, 1984 order on the basis of the judgment in the plenary action which was in

turn entirely dependent upon the May 15, 1984 order. We cannot accept this argument because it ignores the governing principle of claim preclusion embodied in Fed. R. Civ. P. 60(b)(5).

Fed. R. Civ. P. 60(b)(5) provides in pertinent part as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; New Discovered Evidence; Fraud, etc.
> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order or proceeding for the following reasons:
>
> (5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated . . . .

This rule typically operates in the situation where Party A prevails on the merits in court 1, and subsequently uses that decision to execute judgment against Party B in court 2. Rule 60(b)(5) enables Party B to set aside the judgment in court 2 if it prevails in an appeal of court 1's decision. Thus, the rule plainly contemplates that the entry of judgment in court 2 will not bar appeal of the judgment in court 1 where the judgment in court 2 is based upon the judgment in court 1.

The situation in this case is functionally no different from the typical situation described above, although here, unlike the typical case, it was Party B—the government —who *initiated* the action in court 2. This is a distinction without a difference, however, because in this case, as in the typical case, the second judgment was based solely upon the effect of the first judgment. Thus, to bar appeal of the first judgment here plainly cannot be squared with Rule 60(b)(5).

II.

At the outset, we must decide which of several named plaintiffs are properly joined as parties to this action. The Livera group argues that the district court never

acquired personal jurisdiction over Susan Livera and the Livera Company. More specifically, it relies on an order dated April 21, 1983, in which the district court granted these parties' motion to quash service of process, arguing that "the court determined by its order quashing process that personal jurisdiction never was acquired by a valid service of process." Brief for Appellants-Cross Appellees at 38. We disagree.

The Livera group mischaracterizes the circumstances surrounding the district court's April 21, 1983 order, and thus misinterprets its significance. As we have set forth above, the defendant First National State Bank, in conjunction with denying the allegations of the complaint in its answer, filed a counterclaim against the Livera group demanding the amount due and owing on the loans. The bank then moved to amend its answer and counterclaim to include a third-party complaint against Susan Livera and the Livera Company as additional guarantors of Alpha Hermetic's obligations under the loan.

On December 13, 1982, the district court granted the bank's motion for permission to file a third-party complaint against Susan Livera and the Livera Company, pursuant to Fed. R. Civ. P. 14, after concluding that "all claims arose out of the same transaction and occurrence, and complete relief could not be afforded without the obligations of these parties] being adjudicated." [3] App. at 96. Thereafter Susan Livera and the Livera Company were personally served with the Third Party Summonses and Complaints, *see* App. at 4 (docket entry #28), which alleged liability "pursuant to the terms of

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[3] Fed. R. Civ. P. 14(a) provides in pertinent part as follows:

(a) When Defendant May Bring in Third Party.
At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiffs claim against the third-party plaintiff.

a certain guaranty agreement whereby these plaintiffs unconditionally guaranteed payment when due of each and every liability of Alpha Hermetic Inc. to defendant. . . ." App. at 51.

Susan Livera and the Livera Company subsequently moved to dismiss the complaint against them. After hearing argument, the district court granted the motion, however, on grounds unrelated to any claim of defective service of process. Rather, in an opinion filed on April 21, 1983, the district court concluded that it had previously erred in bringing these parties in under Fed. R. Civ. P. 14. It reasoned that, although Rule 14 "provides that a defendant party, as a third-party plaintiff, may summon a person, not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him . . ." and should be liberally construed, it did not "fit the facts of this case" inasmuch as the damages faced by the bank were not those to which these parties were allegedly liable to the bank; the liability faced by the bank was for damages arising out of violation of federal law whereas Susan Livera and the Livera Company were allegedly liable to the bank for the obligations of Alpha Hermetic. App. at 97. As a result, the district court concluded that Rule 14 could not be "liberalized to encompass the present situation . . . [thus] the motion of Susan Livera and the Livera Company to dismiss is granted." *Id.*

Significantly, the court went on to hold that "while under rule 14 the third-party complaint must be dismissed, Fed. R. Civ. P. 19 contemplates the proper joinder of Susan Livera and the Livera Company." *Id.* The court reasoned that:

> Rule 19 allows joinder if the court has jurisdiction over the subject matter and parties and complete relief cannot be granted amongst those already parties without such joinder. The purpose of the rule stresses the desirability of joining those persons in

> whose absence the court would be obliged to grant only partial relief. Thus, if these persons are amenable to the jurisdiction of the court and can be served with process, they should be joined. . . .
>
> . . .[T]he parties are New Jersey residents and are subject to service of process. . . . Thus, defendant's motion to join Susan Livera and the Livera Company as parties in this action is granted. Two orders accompany this opinion.

App. at 98.

The Livera group relies on one of the two orders issued by the district court following its opinion; the order provided in pertinent part:

> THIS MATTER HAVING BEEN OPENED TO THE COURT BY . . . attorneys for third-party defendant, Susan Livera and The Livera Company, now, upon motion of the aforesaid third-party defendants for an order quashing the service of the third-party summonses and dismissing the third-party complaint, it is on this 21st day of April, 1983.
>
> ORDERED that the aforesaid motion be granted.

App. at 102 (hereinafter "order #1). Specifically, the Livera group asserts on the basis of this order that "[a]fter the summonses were quashed, it was as if they had never existed," Brief for Appellants-Cross Appellees at 37, and further that the district court indicated its belief that service of process had not properly been effectuated when it declared that the parties are '*subject* to service of process'; rather than that they had been served. *Id.* We are unpersuaded by this strained analysis.

The principal problem with the Livera group's position is that it ignores the language of the district court's second order (hereinafter "order #2"), issued simultaneously with order #1, which granted the bank's re-

quest to bring in the Livera Company and Susan Livera as follows:

> IT IS on this 21st day of April, 1983:
>
> ORDERED, that Susan Livera and the Livera Company be and they are hereby joined as party plaintiffs to the above action, and it is further
>
> ORDERED, that Susan Livera and the Livera Company file responsive pleadings upon all parties to this action within 20 days of the date of this order, and it is further
>
> ORDERED, that the caption of this case be amended to provide for Susan Livera and the Livera Company as party plaintiffs without the necessity of further pleadings and that *the Third Party Complaint already on file being herewith designated as a counterclaim without the necessity of further amending or other motions to effectuate this order.*

App. at 100 (emphasis added). Since the district court merely redesignated the bank's claim as a counterclaim pursuant to Fed. R. Civ. Pro. 19, under the express terms of order #2, no new process was necessary.

We agree with the government that the correct interpretation of the opinion and orders at issue here is that order #1 followed from the court's conclusion that the third-party complaint under Fed. R. Civ. P. 14 had been erroneously granted and *not* because it believed service of process was inadequate. Indeed, we find absolutely no basis in the record for the assertion that the district court considered service of process upon Susan Livera and the Livera Company to be defective.

There is no question that these parties were served with third-party summonses and complaints, and there is no reference to inadequacy of this process in any of the district court's orders or opinions. Indeed, the fact that

the district court directed responsive pleadings from these parties within 20 days clearly manifested its understanding that adequate process had been served and no new process would be issued. The Livera group's reliance on the court's statement that "the parties are New Jersey residents and are subject to service of process here" is entirely misplaced. That language merely reiterates the test of Fed. R. Civ. P. 19, which provides that "[a] person who is person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . ." More important, we are confident that, insofar as the district court was fully aware of the parties' claim of defective process, had it accepted that argument it would have expressly so declared, rather than relying on an oblique suggestion of such in its opinion. On the basis of this reasoning, we can only conclude that the district court considered the process received by Susan Livera and the Livera Company to be fully adequate.

We further conclude, as did the district court by virtue of order #2, that there was no need to re-serve Susan Livera and the Livera Company after its April 21, 1983 opinion. Receipt of the first summons plainly informed the parties here that a lawsuit had been commenced against them and the complaint provided actual notice of the claims asserted against them. The court's order #2 directed them to file an answer to that claim within twenty days and they did. It is uncontroverted that the claim asserted against the parties at present is the same as was served them in the third-party complaint. Although the documents served were captioned "Third Party Summons" and "Third Party Complaint" and were incorrectly served pursuant to Rule 14 instead of Rule 19, we find these errors insignificant; the court acquired personal jurisdiction over Susan Livera and the Livera Company by personal service of process and they were

in no way misled or prejudiced in their ability to defend this action as a result of these discrepancies.

Thus, we hold that, at least for purposes of this appeal, Susan Livera and the Livera Company are proper parties to this action.

III.

At the heart of this procedural quagmire is the basic question of whether the district court erred in dismissing the SBA's amended answer and counterclaim without undertaking a consideration of the factors outlined by us in *Poulis v. State Farm Fire and Casualuty Co.*, 747 F.2d 863 (3d Cir. 1984). In *Poulis*, we set the standards to be employed in deciding whether the extreme measure of dismissal is an appropriate sanction for procedural default. The threshold question which must be addressed, however, is whether the district court initially erred in granting the government the right to assert the claim. This query serves as a basis for the cross-appeal filed in this action by the Livera group.

The Livera group acknowledges that liberal amendment of pleadings is the call of the day, nonetheless, it alleges that here the district court was misled as to the reason for the long delay causing the government's tardy response to its complaint and, this being so, that the court abused its discretion in affording the government the opportunity to present the late pleadings. The Livera group contends that the court should have requested more detailed information regarding the cause of the delay and alleges further that, if the court had so inquired, it would not have found just cause to permit the filing.

The Livera group's concession that liberal pleading requirements are favored was not misplaced. Although it asserts that it was prejudiced by allowance of the late pleadings because it relied on the government's inactivity and did not file an administrative claim, the Livera group

was unable to state affirmatively that the statute of limitations governing the time limits for filing of the administrative claim had expired at the time the government was granted leave to file its amended answer and counterclaim. We thus can discern no abuse of discretion in the district court's originally granting the government leave to file its late pleadings.

We turn now to the district court order of May 15, 1984, which, in effect, dismissed the government's counterclaim for failure to follow his original order granting the government leave to amend its pleadings and to file the counterclaim.

In regard to the viability of its claim, the government argues that the portion of the order which foreclosed its opportunity to pursue its counterclaim for the unpaid balance of the loan represented an extreme sanction and that the district court's refusal to consider the *Poulis* factors in dismissing the claim was reversible error.

Our scope of review is whether the district court abused its discretion in dismissing the government's counterclaim. *Dunbar v. Triangle Lumber and Supply Co.*, 816 F.2d 126 (3d Cir. 1987).

Because meritorious claims or defenses may be precluded, we have cautioned that dismissal should be imposed only as a sanction of the last resort. *Scarborough v. Eubanks*, 747 F.2d 871, 875 (3d Cir. 1984). Whether an order of dismissal is a proper exercise of a district court's discretion is measured by a six-fold test:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders . . .; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than a dismissal,

which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Dunbar v. Triangle Lumber Co., 816 F.2d 126, 128, *quoting Poulis*, 747 F.2d at 868.

Although the parties have presented us with their respective positions concerning the application of the *Poulis* factors here, such a determination falls outside our review powers. It is the function of the appellate court to determine if the court properly balanced the *Poulis* factors and whether the record supports its findings. *Hicks v. Feeney*, 850 F.2d 152 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 786 (1989). Here the district court simply did not undertake any *Poulis* balancing. Although some reviewing courts in the absence of a district court analysis have applied their own *Poulis* test, *see Ali v. Sims*, 788 F.2d 954 (3d Cir. 1986), we do not undertake this task here as it would require factual findings not within the parameters of our review. We therefore determine that the case must be remanded to the district court for consideration of the *Poulis* factors.

IV.

We further hold that the district court did not err in dismissing the complaint against the SBA for lack of jurisdiction. The essence of the Livera group's complaint set forth a dispute which constituted an administrative matter under 28 U.S.C. § 2765(a) which must first be presented to the proper agency. As correctly noted by the district court, this is a jurisdictional requirement not subject to waiver by the government. *Kielwien v. United States*, 540 F.2d 676 (4th Cir.) *cert. denied*, 429 U.S. 9790 (1976). Because the Federal Tort Claims Act constitutes a waiver of sovereign immunity, the Act's established procedures have been strictly construed. *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), *overruled on other*

grounds, 659 F.2d 306 (3d Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982).

Arguing in opposition to the propriety of the district court's dismissal of its complaint, the Livera group in sum claims that the district court mischaracterized the scope and nature of the claims against the SBA.

First, the Livera group argues that the court should have found sufficient compliance with the notice requirements of the Federal Tort Claims Act and cites *Blue v. United States*, 567 F. Supp. 394 (D.Conn. 1983), as authority that its action survives dismissal. In *Blue*, the district court found the jurisdictional requirements of § 2675(a) to have been satisfied when the agency involved was given adequate notice to investigate the claim and responded to it. The dicta of *Blue* does not help the Livera group. We agree with the district court here that the Liveras failed to carry the burden of establishing that even the rudiments of an administrative claim were filed.

In *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985), we reinforced prior holdings that timebars with respect to the filing of claims against the United States must be strictly construed. *See Tucker v. United States Postal Service*, 676 F.2d 954 (3d Cir. 1982) (presentation of claim within two years to agency is critical event for satisfaction of statute of limitations). Although we have on occasion afforded a liberal interpretation to the *contents* of the pleadings, we have remained steadfast to a strict application of the filing requirements themselves. Even if we were to accept the Livera group's contention that its filing of the complaint in district court provided sufficient notice to the government agency involved, we are nonetheless compelled to find the complaint inadequate for administrative purposes under the Tort Claims Act since the complaint failed to state damages in a sum certain as mandated by 28 C.F.R. § 14.2(b)(1), which

sets forth the content standards required for tort claims against the United States.

Second, the Livera group argues that accompanying its tort claim was a statutory claim for money damages under the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1948), which could not have been adjudicated in the administrative forum.

The district court's review of the complaint failed to discern a contractual claim against the SBA and our plenary review reveals no cause to deviate from this decision. Although some of the complaint's allegations contain contractual nomenclature, no stretch of the language of the complaint describes a Tucker Act cause of action.

A Tucker Act cause of action is also foreclosed for jurisdictional reasons. Under the Tucker Act, the United States Claims Court and the district courts share original jurisdiction over non-tort monetary claims against the United States for amounts not exceeding $10,000, 28 U.S.C. § 1346(a)(2). Original jurisdiction over claims seeking more than $10,000 vests exclusively in the Claims Court. *Chabal v. Reagan*, 822 F.2d 349 (3d Cir. 1987); 28 U.S.C. § 1491. Accordingly, the Livera group's assertion of damages in excess of $10,000, if indeed raised in the context of a contractual action, removes its claim from the jurisdiction of the district court. Also, there is no evidence to support the contention that each individual Tucker Act claim of each plaintiff is less than $10,000 which might arguably vest jurisdiction within the district court, *see Petersburg Borough v. United States*, 839 F.2d 161 (3d Cir. 1988).

Third, when the Livera group moved for reconsideration of the court's dismissal of its claims against the SBA, it also raised the possibility that its claims, in the context of the possible viability of the SBA's counterclaim, were recognizable under the doctrine of recoupment. We do find merit to the position that a recoup-

ment defense remains available to the plaintiffs. A recoupment claim against the United States government "arises out of the same transaction or occurrence as the main suit and the relief sought neither exceeds nor is different from that demanded by the sovereign." *United States v. Penn*, 632 F. Supp. 691, 693 (D.V.I. 1986).

The government contests the availability of a recoupment defense here because its action is purely contractual and the Livera group's claim sounds in tort. We, however, do not adhere to the theory that recoupment is defeated by a tort/contract distinction. Withstanding the authority cited by the government in support of its argument (*Federal Deposit Insurance Corporation v. Shinnick*, 635 F. Supp. 983 (D.Minn. 1986)), the more persuasive authorities are to the contrary.[4] The Supreme Court has held that when the United States institutes an action, a defendant may assert by way of recoupment *any claim* arising out of the same transaction or occurrence as the original claim in order to reduce or defeat the government's recovery. *United States v. U.S. Fidelity and Guaranty Company*, 309 U.S. 506 (1940). *See also In Re Monongahelia Rye Liquors*, 141 F.2d 864, 869 (3d Cir. 1944) (nature of recoupment defense arises from feature of transaction upon which primary action is based). The respected treatises which discuss the recoupment doctrine are in accord. *See* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1427 (1971 & Supp. 1988); 3 J. Moore, Moore's Federal Practice §§ 13.02, n.1, 13.26 (1988). The Livera group's allegations against the SBA, arising out of the administration

[4] Indeed, reliance upon this same case was criticized by the Court of Appeals for the Eight Circuit in United States v. Johnson, 853 F.2d 619 (8th Cir. 1988). The court in *Johnson* noted that *Shinnick* was based on an erroneous interpretation of Frederick v. United States, 386 F.2d 481 (5th Cir. 1967), and that it was made clear in United States v. Irby, 618 F.2d 352 (5th Cir. 1980), which antedated *Frederick*, that a tort claim may be asserted to recoup a government contract claim. *Johnson*, 853 F.2d at 631, n.5.

of the very loan which the government seeks to collect against, firmly fits within the encompassing language regarding the availability of a recoupment defense.

V.

We conclude, therefore, that the matter must be remanded to the district court to consider whether, under *Poulis*, dismissal of the government's counterclaim is an appropriate sanction upon the government for its tardy handling of this matter. If the court determines that dismissal is inappropriate, the Livera group is entitled to assert its recoupment defense.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 88-5187 and 88-5216

ALDO LIVERA, JR., ETC.,
Appellants-Cross-Appellees

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY, ETC.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, *Circuit Judges* and HUYETT, *District Judge**

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

/s/ Carol Los Mansmann
Circuit Judge

Filed: August 17, 1989

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* Honorable Daniel H. Huyett 3rd of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-1730

ALDO LIVERA, JR., *et al.*,
Plaintiffs,

and

SUSAN LIVERA, *et al.*,
Involuntary Plaintiffs,

v.

FIRST NATIONAL STATE BANK OF NEW JERSEY, *et al.*,
Defendants.

Appearances:

Cerny & Mochary
By: Gianni Donati, Esq.
26 Park Street
Montclair, NJ 07042

(Attorneys for Aldo Livera, Jr.,
Alpha Hermetic, Inc., Susan Livera,
and The Livera Company)

Hon. W. Hunt Dumont
United States Attorney
By: Andrew J. Miller, Esq.
Assistant United States Attorney
970 Broad Street
Newark, NJ 07102

(Attorney for Small Business Administration)

OPINION

[Filed April 11, 1984]

FISHER, Chief Judge.

Plaintiffs move this court for *vacatur*, clarification, and/or reconsideration of this court's February 3, 1984, opinion and for such other relief as deemed appropriate. For the reasons stated below, plaintiffs' motion is granted in part and denied in part.

In the opinion filed February 3, 1984, this court dismissed those portions of plaintiffs' complaint sounding in tort brought against federal defendants Small Business Administration (SBA) and United States of America for failure to file an administrative claim. The effect of the order filed on the same date was a dismissal of the entire complaint against the federal defendants. Plaintiff contends this was error in that the complaint properly pleads equitable and contractual claims upon which relief can be granted. Upon review of the pleadings and papers submitted in support of this and the underlying motion, the court finds no such error.

The portions of the complaint supposedly supporting an equitable claim for relief, namely, Counts One and Three, are clearly negligence claims. Plaintiffs in substantial part assert defendants failed to perform the statutorily required duty, in effect breaching the duty created by the statute and regulations. Although plaintiff does seek injunctive relief, such relief is a remedy and not a cause of action. Accordingly, Counts One and Three, as well as Counts Four and Five which are admittedly tort claims, are properly dismissed.

Plaintiffs further assert in support of their motion for reconsideration that Counts Two and Six sound in contract and should not have been dismissed against federal defendants. Plaintiffs fail to supply any evidence of an existing contractual relationship with the SBA. The

very language of Count Two suggests a claim for tortious interference with a contractual relationship and not a cause of action based on an implied or express contract. Even assuming the bald assertions made by plaintiffs, that such a contractual relationship either express or implied exists, this court has no subject-matter jurisdiction over the contract claim. As correctly noted by defendants, 28 U.S.C. § 1346(a)(2) mandates that if plaintiffs' contract claim against defendants is for an amount in excess of $10,000, this court lacks subject-matter jurisdiction and the claims properly should be brought in the Claims Court.[1] Accordingly, I find the remaining portions of plaintiffs' complaint were properly dismissed. Plaintiffs remaining arguments are found unpersuasive by this court and, therefore, plaintiffs' motion seeking reconsideration is denied.

Finally, I grant that portion of plaintiffs' motion which seeks clarification on the issue of whether an affirmative claim has been properly asserted by the SBA in this action. Defendant SBA has failed to serve and file a counterclaim after having been granted leave to do so in this court's order dated April 11, 1983. Therefore, I find that this defendant has failed to properly assert a counterclaim in this action. Plaintiff will submit an order within 10 days. No costs.

April 11, 1984.

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[1] Plaintiffs' complaint states that the amount in controversy exceeds $10,000, exclusive of interest and costs.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 82-1730-F

ALDO L. LIVERA, JR., ALPHA HERMETIC, INC., C.M.R. INDUSTRIES, INC., CHARLES DONALD MCALLISTER, JR., and ALICE MCALLISTER, *Plaintiffs*,

and

SUSAN LIVERA and THE LIVERA COMPANY, *Involuntary Plaintiffs*,

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY, PATRICK WALLACE, BEN BERZIN, JR., "A", "B", MICHAEL CARDENAS, in his capacity as Administrator of the SMALL BUSINESS ADMINISTRATION, RONALD LANGELL, "C", "D" and THE UNITED STATES OF AMERICA, *Defendants*.

ORDER

[Filed May 15, 1984]

This matter having been opened to the Court by Messrs. Cerny & Mochary (Gianni Donati, Esq., appearing), attorneys for plaintiffs Aldo L. Livera, Jr. and Alpha Hermetic, Inc. ("plaintiffs"), and plaintiffs having moved for reconsideration or modification of this Court's February 3, 1984 order, and to clarify whether the Small Business Administration ("SBA") has validly asserted a counterclaim against the plaintiffs herein, and the Court

having considered the SBA's position that its counterclaim should be deemed filed *nunc pro tunc*,

Now, on this 15th day of May, 1984, it is

ORDERED that upon reconsideration, plaintiffs' motion is granted in part and denied in part, as follows:

(1) Upon review of the record herein and the papers submitted by the parties, the Court adheres to its February 3, 1984 order and opinion.

(2) The status of the SBA's counterclaim is clarified to the extent that the Court finds that the SBA, on its motion, was granted leave to serve and file an amended answer with a proposed counterclaim but failed to serve and file same after having been granted leave to do so in this Court's April 11, 1983 order, and its request to assert a counterclaim at this point in the proceedings, *nunc pro tunc*, is denied.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER, C.J.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-1730-A

ALDO L. LIVERA, JR., ALPHA HERMETIC, INC., C.M.R. INDUSTRIES, INC., CHARLES DONALD MCALLISTER, JR., and ALICE MCALLISTER, *Plaintiffs*,

and

SUSAN LIVERA and THE LIVERA COMPANY, *Involuntary Plaintiffs*,

vs.

FIRST NATIONAL STATE BANK OF NEW JERSEY, PATRICK WALLACE, BEN BERZIN, JR., "A", "B", MICHAEL CARDENAS, in his capacity as Administrator of the SMALL BUSINESS ADMINISTRATION, RONALD LANGELL, "C", "D" and THE UNITED STATES OF AMERICA, *Defendants*.

JUDGMENT

It appearing that all claims herein not dismissed by order of the Court have been settled and compromised to the satisfaction of the parties,

IT IS on this 4th day of February, 1988,

ORDERED, ADJUDGED, and DECREED that the action be, and it hereby is, dismissed without costs.

/s/ [Illegible]
U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 85-3224

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALPHA HERMETIC, INC., *et al.*,
Defendants.

Appearances:

Hon. Thomas W. Greelish
United States Attorney
By: Ms. Susan C. Cassell
Assistant United States Attorney
970 Broad Street
Newark, NJ 07102

(For the Government)

Lane & Mittendorf
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26 Park Street
Montclair, NJ 07042

(Attorneys for Defendants Alpha Hermetic, The Livera Company, Aldo Livera & Susan Livera)

OPINION

[Filed January 15, 1986]

FISHER, Chief Judge.

Defendants Alpha Hermetic, Inc., The Livera Company, Aldo Livera and Susan Livera (Livera Defendants) moved for summary judgment dismissing the claims against them pursuant to Fed. R. Civ. P. 56(b). I have considered the papers submitted and oral argument of counsel presented on December 9, 1985. For the reasons stated, I grant defendants' motion.

The Livera Defendants assert that the action against them should be dismissed because plaintiff (the Small Business Administration (SBA), a United States agency) is estopped from bringing this action because of an order issued by this court on May 15, 1984, in a related case, *Livera, et al., v. The First National State Bank of New Jersey, et al.*, Civil Action No. 82-1730. Defendants suggest that plaintiff in this case in fact is raising a compulsory counterclaim which, according to Fed. R. Civ. P. 13(a) and (f), should have been raised only in responsive pleading or by amended pleading, not by the institution of a new action. Defendants contend that plaintiff was given an opportunity to amend its pleading in the prior matter, but did not do so and, consequently, should be estopped from bringing this action.

The within action was commenced on June 28, 1985, by the SBA, alleging default by defendants on a note secured by it. Alpha Hermetic is a small business within the meaning of 15 U.S.C. § 632; Aldo Livera is president of Alpha Hermetic; CMR Industries is a New York corporation and a guarantor of Alpha Hermetic's loan; Charles McAllister is the president of CMR Industries; Alice McAllister is a guarantor of Alpha Hermetic's loans; and First National State Bank of New Jersey (the Bank) provided a small-business loan to Alpha Hermetic, acting as an agent for the SBA.

Suit originally was brought in the Eastern District of New York in 10/30/81 (and later transferred to this

district) by the Liveras, Alpha Hermetic, the McAllisters, and CMR Industries against the SBA and the Bank, alleging, *inter alia*, that the SBA and the Bank improperly managed and handled the loan arrangement plaintiffs sought. Plaintiffs sought monetary and equitable relief. Defendants moved to amend their answer to interpose a counterclaim; this court granted the motion in its order of April 11, 1983. The counterclaim was never filed or served.

Defendants then moved to have the court dismiss the tort claims against them for failure to serve an administrative claim, which the court granted on February 3, 1984. Plaintiffs moved for reconsideration and clarification of this order. In an order dated May 15, 1984, the court adhered to its order dismising the tort claims and clarified the status of defendants' counterclaim, stating that

> [t]he status of the SBA's counterclaim is clarified to the extent that the Court finds that the SBA, on its motion, was granted leave to serve and file an amended answer with a proposed counterclaim but failed to serve and file same after having been granted leave to do so in this Court's April 11, 1983 order, and its request to assert a counterclaim at this point in the proceedings, *nunc pro tunc*, is denied.

Defendants' appeal from this order was dismissed.

On June 27, 1985, defendants in the prior action, SBA and United States of America, filed the present action against plaintiffs in the prior action, Alpha Hermetic, the Liveras, the McAllisters, and CMR Industries, alleging the very same claim which was asserted in the dismissed counterclaim. Before answering, defendants Alpha Hermetic, The Livera Company, Aldo Livera and Susan Livera moved for summary judgment of the action. I grant this motion in favor of these defendants.

The moving defendants contend that plaintiff's action against them should be dismissed for two reasons: (1) This court's previous order in the related case bars the action, and (2) the previous order correctly determined that the counterclaim was compulsory and for that reason could not be brought now. I agree.

Rule 41 of the Federal Rules of Civil Procedure states in pertinent part that

> (b) . . . . [f]or failure of the plaintiff to prosecute, or to comply with these rules, . . . a defendant may move for dismissal of an action or of any claim aaginst him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.
>
> (c) . . . . The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third party claim. . . .

The effect of this rule, then, is to render a dismissal "with prejudice" unless explicitly stated otherwise. Plaintiff incorrectly states the contrary contention. This court's May 15, 1984, order dismissed the Government's proposed counterclaim for failure to prosecute. The effect of this dismissal is that it operates as a dismissal with prejudice with the accompanying *res judicata* effect of barring the present claim against defendants. *See Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42-43 (2d Cir. 1982).

The Livera Defendants further assert that the SBA's claim should be barred because it states a compulsory counterclaim which must be brought only by responsive pleading or by amended pleading. I agree. Fed. R. Civ. P. 13(a) states that

> [a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader

> has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The SBA's counterclaim in the former action meets the definition of a compulsory counterclaim. "If there is a 'logical relationship' between the counterclaim and the main action, the counterclaim may be considered to have arisen out of the same 'transaction or occurrence,' . . . and, therefore, may be deemed to be a compulsory counterclaim under Rule 13(a) . . . ." *Wheaton Glass Co., etc., v. Pharmex, Inc.*, 548 F. Supp. 1242, 1246 (D.N.J. 1982) (citations omitted).

> The phrase "logical relationship" is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, . . . fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action. Indeed the doctrine of *res judicata* compels the counterclaimant to assert his claim in the same suit for it would be barred if asserted separately, subsequently.

Great Lakes Rubber Corporation v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961). This case today is precisely the situation contemplated by this rule. The counterclaim sought to be interposed by the SBA in the previous action forms the basis of the complaint in this action. The claim involved substantially the same issues —the existence of a valid loan arrangement between plaintiffs and defendants. The counterclaim in the previ-

ous case and the present cause of action seek to collect from defendants the principal and interest on the loan which is the subject of the other action. To permit both cases to go forward would involve a duplication of effort in that the existence and terms of a loan agreement must be proven. Clearly, what the SBA now attempts to assert as a valid claim against defendants properly should have been brought as a counterclaim in the other action.

For the reasons stated, I grant defendants' motion for summary judgment. The action is dismissed as to all defendants. An order accompanies this opinion. No costs.

January 13, 1986.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action File No. 85-3224 F

Hon. Clarkson S. Fisher

UNITED STATES OF AMERICA,

Plaintiff,

—against—

ALPHA HERMETIC, INC., THE LIVERA COMPANY, CMR INDUSTRIES, INC., ALDO LIVERA, SUSAN LIVERA, CHARLES MCALLISTER and ALICE ANN MCALLISTER,

Defendants.

This matter having been opened to the Court by Messrs. Lane & Mittendorf, attorneys for defendants Alpha Hermetic, Inc., The Livera Company, Aldo Livera, and Susan Livera ("defendants"), and defendants having moved pursuant to Rule 56(b), Fed. R. Civ. P., for summary judgment dismissing the complaint as against them, and the Court having considered the motion and having heard argument thereon, and good cause appearing therefor,

Now, on this 13th day of January, 1986, it is

ORDERED that defendants' motion for summary judgment is granted in its entirety and that the complaint be, and it hereby is, dismissed as against them with prejudice without costs; and it is further

ORDERED that, the Court having determined that there is no just cause for delay, a final judgment be, and is hereby is, directed to be entered dismissing the complaint, with prejudice and without costs, as against all defendants.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
U.S.D.J.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Newark, N.J. 07101

LETTER OPINION

[Filed March 4, 1986]

Chambers of
Clarkson S. Fisher
Chief Judge

March 4, 1986

Ms. Susan C. Cassell
Assistant United States Attorney
970 Broad Street
Newark, NJ 07102

Edward C. Cerny, III, Esq.
Lane & Mittendorf
120 Wood Avenue South
Metro Park, NJ 08830

Re: United States v. Alpha Hermetic, Inc., et al.
Civil Action No. 85-3224

Dear Counsel:

Plaintiff, Small Business Administration, moves for reconsideration of this court's January 13, 1986, opinion and order granting defendants' motions for summary judgment. I have reviewed the papers submitted and heard oral argument. There is no compelling reason to reverse or modify my previous ruling; I deny the motions for reconsideration and to vacate the previous order.

Plaintiff has offered nothing new in its moving papers and has not established any error in the previous decision and order justifying reargument and reconsideration. By means of a new civil action, plaintiff attempted to as-

sert as a new claim that which it was not permitted to bring as a counterclaim in a related action. The Federal Rules of Civil Procedure and case law cited by plaintiff do not permit such a result. Accordingly, reconsideration of the previous opinion and order is not warranted. Defendants will submit an order. No costs.

Very truly yours,

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
Chief Judge

CSF:mgm
Original to Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action File No. 85-3224 F

Hon. Clarkson S. Fisher

UNITED STATES OF AMERICA,
Plaintiff,

-against-

ALPHA HERMETIC, INC., THE LIVERA COMPANY, CMR INDUSTRIES, INC., ALDO LIVERA, SUSAN LIVERA, CHARLES MCALLISTER and ALICE ANN MCALLISTER,
Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

This matter having been opened to the Court by the United States Attorney for the District of New Jersey, attorney for plaintiff the United States of America, and order of January 13, 1986, which order granted summary plaintiff having moved for reconsideration of the Court's judgment dismissing the complaint, and the Court having considered the motion to reconsider; and the Court having issued its letter opinion, dated and filed March 4, 1986, determining not to grant the motion; and good cause appearing therefore,

Now, on this 27th day of March 1986, it is

ORDERED that plaintiff's motion for reconsideration be, and it hereby is, denied and that the January 13, 1986,

order be, and it hereby is, adhered to in all respects; and it is further

ORDERED that, in accordance with the order of January 13, 1986, the Clerk is hereby directed to enter judgment dismissing the complaint against all defendants, with prejudice and without costs.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
U.S.D.J.